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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. K.P., Defendant and Appellant.	A158577 (Contra Costa Superior Court Case No. J9600854)

Defendant K.P. appeals the denial of his Penal Code[1] section 1170.95 petition, arguing that the trial court erred in finding he had failed to make a prima facie showing of entitlement to relief under that statute.

The Attorney General concedes error, and we accept that concession. We shall therefore reverse and remand, directing the trial court to issue an order to show cause and conduct a hearing pursuant to section 1170.95, subdivisions (c) and (d).

[1] All statutory references are to the Penal Code unless otherwise specified.

I. BACKGROUND

A. Underlying Facts[2]

On December 18, 1996, when defendant was 16 years old, the People filed a petition alleging that he had committed robbery and murder by personal use of a deadly or dangerous weapon, a .22 caliber pistol. The juvenile court sustained the robbery and murder allegations, dismissed the weapon enhancement allegations, and sentenced defendant to 25 years to life on the murder charge and five years on the robbery charge, which was stayed pursuant to section 654.

Defendant appealed, and this court affirmed in an unpublished opinion in May 1998. We summarized the relevant criminal conduct as follows: "Although there is a measure of uncertainty as to all details, it seems clear that Angela Tuttle was shot in the head by Markel (also spelled Marquel) Saucer on a Richmond street while she was trying to purchase marijuana."[3] (*In re K.P.* (May 18, 1998) A078912 [nonpub. opn.].) We noted that defendant had provided multiple statements to police, and explained that we were bound by the juvenile court's adverse credibility finding regarding defendant's exculpatory statement that he told Saucer he did not want to rob Tuttle, pedaled his bike away from the scene, and merely picked up some items that were lying near Tuttle after he turned his bike around in response to hearing a shot. Our opinion further explained that although the juvenile court could find defendant's exculpatory statement "lacked credibility in

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[2] As this appeal turns on questions regarding the appropriate construction of section 1170.95, we summarize the facts only briefly.

[3] At the time we affirmed the judgment in defendant's case, Saucer was awaiting trial as an adult. According to defendant, Saucer was subsequently tried as an adult and convicted of murder.

significant particulars," the court was nonetheless "entitled to accept other parts" of defendant's statements to police, including those in which he admitted "(1) being with the killer prior to the killing; (2) knowing the killer had a gun; (3) knowing the killer intended robbing Ms. Tuttle; (4) taking orders from the killer concerning removal of the victim's vehicle from the scene; (5) disposing of evidence connecting him with the shooting; and, (6) thereafter meeting with the killer as the latter directed." In rejecting defendant's argument that there was insufficient evidence to support the murder charge, we concluded: "Other evidence showed that [K.P.] was arrested with the killer, in the victim's car, only a few hours after the shooting. The evidence thus shows a connection between [K.P.] and the actual shooter immediately before and after the shooting. This will support an inference that the connection was maintained during the shooting. The evidence, and inferences deducible therefrom, are sufficient to support a rational conclusion that [K.P.] was an aider and abettor to the robbery, and thereafter, the murder."

B. Defendant's 1170.95 Petition

On May 31, 2019, defendant filed a form petition pursuant to section 1170.95, checking all the pre-printed boxes and requesting that the court appoint the public defender to represent him. The court did so on June 4, 2019.[4]

After the prosecutor and appointed defense counsel briefed the merits of the petition, the court issued a written order denying defendant's petition,

[4] Because neither party contends the court erred in appointing counsel at that stage in the proceedings, we need not address the question of precisely when the right to counsel arises under section 1170.95, subdivision (c), an issue on which our Supreme Court has granted review. (E.g., *People v. Lewis* (2020) 43 Cal.App.5th 1128, review granted Mar. 18, 2020, S260598.)

finding that he had failed to "establish[] a prima facie case that he 'could not be convicted' of either First or Second Degree Murder," as required for relief under section 1170.95, subdivision (c). In addition to noting defendant's six inculpatory statements that were set forth in our 1998 opinion (see *ante*, section (I)(A)), the trial court determined the record also demonstrated that defendant "was present with the killer/shooter when the victim was shot," and that "[a]fter the victim was shot and lay mortally wounded, [defendant] gathered up items of her personal property on or near her person as she lay dying, thus sharing in the proceeds of the robbery." (*In re K.P., supra,* A078912.) The court found that these "specific facts" established that defendant "was both a major participant in the robbery and also acted with reckless indifference to the life of the victim." (*In re K.P., supra,* A078912.) Relying heavily on our 1998 opinion, the trial court concluded that defendant had therefore failed to make a "prima facie case that he 'could not be convicted' of felony murder" because "[i]n this court's view, the evidence described in the Court of Appeal[] decision was sufficient to allow a rational factfinder, if the case were tried now, to conclude beyond a reasonable doubt that [defendant] was guilty of felony murder because he was both a major participant in the robbery and acted with reckless indifference to human life." (*In re K.P., supra,* A078912.)

II. DISCUSSION

Defendant argues that the court erred by failing to assume the truth of his factual allegations; incorrectly applying the standard of review for sufficiency of the evidence to two issues that had never been addressed in the juvenile court or on appeal (i.e., whether he was a major participant and whether he acted with reckless disregard for human life); and failing to order a hearing to resolve disputed facts as to those two issues. The Attorney

General agrees with defendant and concedes that the matter should be remanded with directions to issue an order to show cause and to hold a hearing under section 1170.95, subdivisions (c) and (d), as defendant's petition "states a prima facie case and the record of conviction does not indisputably demonstrate ineligibility for relief." (*People v. Drayton* (2020) 47 Cal.App.5th 965, 968 (*Drayton*) [trial court must "accept the assertions in the petition as true unless facts in the record conclusively refute them as a matter of law. If, accepting the petitioner's asserted facts as true, he or she meets the requirements for relief listed in section 1170.95, subdivision (a), then the trial court must issue an order to show cause"].) We agree and accept this concession.

A. Overview of Senate Bill No. 1437 and Section 1170.95

Senate Bill No. 1437, which became effective on January 1, 2019, " 'amend[ed] the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.' " (*People v. Lamoureux* (2019) 42 Cal.App.5th 241, 247.) Before Senate Bill No. 1437, "a defendant who intended to commit a specified felony could be convicted of murder for a killing during the felony, or attempted felony, without further examination of his or her mental state." (*Lamoureux*, at pp. 247–248.) Further, "[i]ndependent of the felony-murder rule, the natural and probable consequences doctrine rendered a defendant liable for murder if he or she aided and abetted the commission of a criminal act (a target offense), and a principal in the target offense committed murder (a nontarget offense) that,

even if unintended, was a natural and probable consequence of the target offense." (*Id.* at p. 248.)

"Senate Bill No. 1437 changed murder liability under these theories through two statutory amendments. First, '[t]he bill redefined malice under section 188 to require that the principal acted with malice aforethought. Now, "[m]alice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3).)' (*People v. Turner* (2020) 45 Cal.App.5th 428, 433.) Second, the bill amended section 189 to provide that a defendant who was not the actual killer and did not have an intent to kill is not liable for felony murder unless he or she 'was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.' (§ 189, subd. (e)(3).)" (*People v. Cooper* (2020) 54 Cal.App.5th 106, 113, review granted Nov. 10, 2020, S264684 (*Cooper*).)

Senate Bill No. 1437 also enacted section 1170.95, which sets forth the procedure by which a defendant "convicted of felony murder or murder under a natural and probable consequences theory" may petition to have the "murder conviction vacated and to be resentenced on any remaining counts." (§ 1170.95, subd. (a).) "Briefly, there are four main steps in the process. First, the defendant files a petition, which the trial court may deny without prejudice if it does not contain certain required information. (§ 1170.95, subd. (b).) Second, the court determines whether the defendant has made a prima facie showing of entitlement to relief. If so, it issues an order to show cause. (§ 1170.95[, subd.](c).) Third, the court holds an evidentiary hearing to determine whether the murder conviction should be vacated. (§ 1170.95, subd. (d)(1), (3).)" (*Cooper, supra,* 54 Cal.App.5th at p. 114.) At the evidentiary hearing conducted pursuant to subdivision (d), "the burden of

proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing," and "[t]he prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." (§ 1170.95, subd. (d)(3).) "And finally, if the defendant is entitled to relief, the court recalls the sentence, vacates the murder conviction and any accompanying enhancements, and resentences the defendant. (§ 1170.95, subd. (d).)." (*Cooper, supra,* 54 Cal.App.5th at p. 114.)

B. Analysis

The parties agree, and our opinion affirming defendant's conviction makes clear, that defendant was not Angela Tuttle's actual killer. The issue, then, is whether the trial court erred in summarily denying defendant's petition based on its determination that defendant was a major participant in the robbery who acted with reckless indifference to human life. (*Cooper*, *supra,* 54 Cal.App.5th at p. 113; § 189, subd. (e)(3).) As the fundamental question in this case is whether the trial court properly interpreted and understood its role under section 1170.95, we review de novo its denial of defendant's petition. (*People v. Gonzalez* (2017) 2 Cal.5th 1138, 1141.)

Recent decisions have addressed certain ambiguities in the language of section 1170.95, subdivision (c), and have consequently reached different conclusions as to the precise steps to be followed in assessing whether a defendant has established a prima facie case. (Compare, e.g., *People v. Verdugo* (2020) 44 Cal.App.5th 320, 328–329, 332, review granted Mar. 18, 2020, S260493 [subdivision (c) requires two separate prima facie reviews—one to determine eligibility for relief, and the second to determine entitlement to relief—with the right to counsel arising only in conjunction with the second prima facie review] with *Cooper, supra,* 54 Cal.App.5th at

pp. 119–123 [rejecting the two-step prima facie procedure adopted by *Verdugo* and subsequent cases, and holding that the right to counsel arises upon submission of a facially sufficient petition].) We need not explore these ambiguities and the split of authority, however, as we agree with both parties that defendant established a prima facie case, and that the trial court erred in making factual determinations as to whether he was a major participant and acted with reckless disregard for human life without issuing an order to show cause and conducting a hearing, as required under section 1170.95, subdivisions (c) and (d).[5]

Section 1170.95, subdivision (c) provides that "[t]he court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor['s] response is served. . . . If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause." The statute "does not further define 'prima facie showing.' " (*Drayton, supra,* 47 Cal.App.5th at p. 975.)

Drayton recently explained that in assessing whether a petitioner has shown a prima facie case under section 1170.95, subdivision (c), "the trial

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[5] Similarly, because this case does not involve a special circumstance finding prior to our Supreme Court's decisions in *People v. Clark* (2016) 63 Cal.4th 522 and *People v. Banks* (2015) 61 Cal.4th 788, we do not address the question of whether such a finding renders a petitioner ineligible for relief under section 1170.95 as a matter of law. (*People v. Jones* (2020) 56 Cal.App.5th 474, 478–479 [noting split of authority and Supreme Court's grant of review in, e.g., *People v. Smith* (2020) 49 Cal.App.5th 85, review granted July 22, 2020, S262835].)

court should assume all facts stated in the section 1170.95 petition are true." (*Drayton, supra,* 47 Cal.App.5th at p. 980.) The court "should not evaluate the credibility of the petition's assertions, but it need not credit factual assertions that are untrue as a matter of law—for example, a petitioner's assertion that a particular conviction is eligible for relief where the crime is not listed in subdivision (a) of section 1170.95 as eligible for resentencing." (*Drayton,* at p. 980.) Moreover, "if the record 'contain[s] facts refuting the allegations made in the petition . . . the court is justified in making a credibility determination adverse to the petitioner.' [Citation.] However, this authority to make determinations without conducting an evidentiary hearing pursuant to section 1170.95, subd[ivision] (d) is limited to readily ascertainable facts from the record (such as the crime of conviction), rather than factfinding involving the weighing of evidence or the exercise of discretion (such as determining whether the petitioner showed reckless indifference to human life in the commission of the crime)." (*Drayton,* at p. 980.)

In this case, as in *Drayton,* defendant made a prima facie showing of eligibility for and entitlement to relief under section 1170.95, subdivision (c): He filed a facially sufficient petition containing the requisite allegations under subdivision (a); "[t]here were no facts in the trial court record that, as a matter of law, refuted [defend]ant's assertion that he had been convicted of first degree murder on a theory of felony murder"; and "there had been no prior finding by a fact finder or admission by [defendant]" that he had been a "major participant in the robbery who acted with reckless indifference to life." (*Drayton, supra,* 47 Cal.App.5th at p. 981; § 1170.95, subds. (a), (c).) As the parties agree, however, the trial court went beyond the "readily ascertainable facts" and engaged in "factfinding involving the weighing of evidence" and the

"exercise of discretion" when it summarily denied defendant's petition without issuing an order to show cause and conducting a hearing, based on its assessment of the disputed questions as to whether defendant was a major participant in the robbery and whether he had acted with reckless indifference to life. (*Drayton, supra,* 47 Cal.App.5th at p. 980.)

We recognize that a recent case, *People v. Garcia* (2020) __ Cal.App.5th __, 2020 Cal. App. Lexis 1051, rejected *Drayton* and held that a trial court could summarily reject a petition without a hearing at the prima facie stage based on its assessment of the facts set forth in an earlier opinion affirming the conviction. (*Id.* at *3–*6, *23–*26.) In that case, the opinion on direct appeal made clear that Garcia had urged the actual killer to "stick [Mosqueda], stick him" while the killer, at least three other fellow gang members, and Garcia were all assaulting Mosqueda pursuant to a pre-approved, "green-lighted" attack. (*Id.* at *25.) *Garcia* construed its earlier opinion to find that "it [wa]s reasonable to infer that [defend]ant intended to kill [the victim] when he directed [the killer] to stab the victim," and held that the petition was properly denied at the prima facie review stage because "[s]ubstantial evidence support[ed] a murder conviction based on a direct aiding and abetting theory." (*Id.* at *23, *25.[6]) The court stated that its application of the substantial evidence test at the prima facie stage was "supported by *People v. Duke* (2020) 55 Cal.App.5th 113," although it recognized that *Duke* "considered the nature of the prosecution's burden at the evidentiary hearing conducted after the petitioner has made a prima facie

[6] The court also found that the record supported an inference that Garcia could have been convicted under an implied malice theory, based on his "stick him" statement during his willful participation in a coordinated gang assault, which demonstrated Garcia's conscious disregard of the fact that the natural and probable consequences of his acts were dangerous to human life. (*Garcia, supra*, 2020 Cal. App. Lexis 1051 at *23, *25.)

showing of eligibility for relief under section 1170.95." (*Garcia,* at *23.) *Garcia* concluded: "In determining whether a petitioner has made a prima facie showing of entitlement to relief under section 1170.95, the courts should not ignore the evidence in the record of conviction that shows the petitioner is ineligible for relief. Where, as here, the record of conviction contains substantial evidence based on which a reasonable trier of fact could presently find petitioner guilty of murder despite the changes made by Senate Bill [No.] 1437, it would be a waste of judicial resources to require a full-blown evidentiary hearing at which the court may rely on the record of conviction. (§ 1170.95, subd. (d)(3).) Accordingly, the trial court did not err in refusing to issue an order to show cause and conduct an evidentiary hearing." (*Garcia,* at *29.)

We find *Garcia* unpersuasive for two fundamental reasons. First, the court's conclusion rested on its view as to how a reasonable jury might have viewed the petitioner's actions if it had been instructed on a valid theory—although it noted that the same facts also supported a contrary interpretation, as "[i]t is also possible that the jury believed [Garcia] made this ['stick him, stick him'] statement but intended only to wound Mosqueda, not kill him." (*Garcia, supra,* 2020 Cal. App. Lexis 1051 at *22.) In our view, it is inappropriate to resolve such factual disputes at the prima facie stage based on an appellate opinion that did not conclusively establish the critical issue of the petitioner's mental state. Second, *Garcia* improperly imported into the prima facie review stage the substantial evidence standard that *Duke* applied at the post-prima facie, evidentiary hearing stage of the section 1170.95 proceedings. (*Garcia,* at *23.) As a result, *Garcia* deprived the petitioner of his statutorily-required opportunity to put on new, additional evidence at an evidentiary hearing, thereby curtailing the fulsome review

mandated by the distinct, step-by-step procedures laid out in section 1170.95, subdivisions (c) and (d). (*Garcia,* at *27–*29; § 1170.95, subd. (c) [prima facie review], subd. (d)(3) [at the evidentiary hearing, the prosecution and petitioner "may rely on the record of conviction or offer new or additional evidence"].)[7]

We therefore conclude that *Drayton,* not *Garcia,* properly understood the trial court's role under section 1170.95. Accordingly, instead of denying the petition based on the briefing, the trial court was required to "first issu[e] an order to show cause and allow[] the parties to present evidence at a hearing, as described in section 1170.95, subdivision (d)." (*Drayton, supra,* 47 Cal.App.5th at p. 982.) At that evidentiary hearing—during which the parties may either rely on the record of conviction or offer new, additional evidence (§ 1170.95, subd. (d)(3))—the court should then conduct the fact-intensive and "multifaceted" inquiry to determine whether the prosecution has proven beyond a reasonable doubt that defendant is "ineligible for resentencing" because he was a major participant in the robbery who had acted with reckless indifference to life. (*Drayton, supra*, 47 Cal.App.5th at p. 981; § 1170.95, subd. (d)(3).) We express no opinion as to whether defendant will ultimately be entitled to relief after the hearing.

III. DISPOSITION

The order denying K.P.'s section 1170.95 petition is reversed. The matter is remanded to the superior court with directions to issue an order to

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[7] We also consider *Garcia* to be factually distinguishable because the evidence there was far more damning, as Garcia willingly "participated in a brutal gang assault upon a helpless victim 'green-lighted' by the gang" and "directed the actual killer to stab the victim." (*Garcia, supra,* 2020 Cal. App. Lexis 1051 at *28.) Here, by contrast, nothing indicates that K.P. directed the killer to shoot Tuttle, and the remaining evidence as to K.P.'s involvement in Tuttle's murder is subject to a "measure of uncertainty."

show cause (§ 1170.95, subd. (c)) and hold a hearing to determine whether to vacate K.P.'s murder conviction, recall his sentence, and resentence him (§ 1170.95, subd. (d)).

BROWN, J.

WE CONCUR:

STREETER, ACTING P. J.

TUCHER, J.